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Dog Sniffs, Technology, and the Mythical Constitutional Right to Criminal Privacy

by KENNETH J. MELILLI*

Suppose the government was capable of detecting criminal conduct by some method or device that would not reveal any information concerning lawful items or activities. Could the acquisition of such information under these circumstances constitute an “unreasonable search” under the Fourth Amendment?¹

This scenario is not merely hypothetical. The most prominent reality in which this question arises involves specially trained dogs, which, using their superior sense of smell, can alert to the presence of illegal drugs.² Most dramatically, suppose that such a specially trained dog (“drug dog”), from a location outside a home, alerts to the presence of illegal drugs inside that home. Assuming that the physical location of the dog at the time of the sniff is not itself an intrusion into a valid privacy interest protected by the Fourth Amendment, the question is whether the sniff itself constitutes a “search” under the Fourth Amendment. In this Article, I suggest that the answer is no—i.e., that the sniff itself is not a “search” under the Fourth Amendment. I also suggest that the considerable opinions and authorities to the contrary are all premised upon a failure to begin the analysis with the Fourth Amendment itself.

I. A Little History

The Fourth Amendment provides:

The right of the people to be secure in their
persons, houses, papers, and effects, against

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1. U.S. CONST. amend. IV.

2. Ric Simmons, *The Two Unanswered Questions of Illinois v. Caballes: How to Make the World Safe for Binary Searches*, 80 TUL. L. REV. 411, 413 (2005).

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³

Even as constitutional provisions go, the Fourth Amendment is particularly indefinite. It does not regulate all governmental encroachments into our privacy, only those that meet the unspecified definitions of "searches" or "seizures." Neither does it proscribe all searches and seizures, only those that are "unreasonable." Moreover, while the Fourth Amendment clearly requires probable cause for the issuance of a warrant, it does not tell us when, if ever, a warrant is required. Finally, it does not tell us what prerequisites, if any, are required for a search or seizure conducted without a warrant.

Consequently, when the United States Supreme Court has been called upon—as it often has—to determine exactly what the text of the Fourth Amendment means, the answers have been anything but obvious. In order to supply the Fourth Amendment with any substance, the Court has had to fashion rules that, while consistent with the spirit and intent of the provision, are by no means the exclusive inference to be derived from its text.

For example, at one time the Court insisted that a search or seizure could only be conducted with probable cause and a warrant, subject only to a few exceptions.⁴ However, as sensible such a rule might be as a matter of policy, it is hardly mandated by the text of the Fourth Amendment. Moreover, the so-called "exceptions" have proven to be so numerous and so extensive that the circumstances in which a warrant, and sometimes also probable cause, is not required can hardly be characterized as exceptional.⁵ More recently, the Court has disavowed the presumption that the Fourth Amendment requires

3. U.S. CONST. amend. IV.

4. *Katz v. United States*, 389 U.S. 347, 357 (1967); *Jones v. United States*, 357 U.S. 493, 497–98 (1958).

5. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 10.01[c], at 163 (5th ed. 2010). For example, warrants are not required for arrests outside the home (*Payton v. New York*, 445 U.S. 573 (1980)), searches of motor vehicles (*California v. Acevedo*, 500 U.S. 565 (1991)), or inventory searches (*Colorado v. Bertine*, 479 U.S. 367 (1987)). Neither warrants nor probable cause are required for, among other circumstances, searches incident to arrest (*Chimel v. California*, 395 U.S. 752 (1969)), stop-and-frisks (*Terry v. Ohio*, 392 U.S. 1 (1968)), or searches of students or their property by public school officials (*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

warrants,⁶ instead focusing upon the specified test of reasonableness.⁷ To the extent that searches often require warrants based upon probable cause, that result is simply the consequence of balancing the individual's legitimate expectations of privacy against the state's legitimate interest in crime detection and prevention.⁸

Even more importantly for our purposes, in the early years, focusing upon the "right of the people to be secure in their persons, houses, papers and effects," the Court restricted the perimeters of the Fourth Amendment to physical trespasses upon one's person, house, papers, or effects.⁹ Invasions of privacy that did not involve a trespass upon one of these four sanctuaries were beyond the scope of the Fourth Amendment.¹⁰

However, in 1967, the Court decided *Katz v. United States*,¹¹ and in so doing, enlarged the scope of the term, "search," to which the prerequisites of the Fourth Amendment apply. With the test of time, *Katz* has been understood to stand for the proposition, articulated by Justice John Marshall Harlan II in his concurring opinion that, for a search to take place, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"¹² Today, then, a governmental intrusion into the privacy of a citizen is not a "search" unless it either involves a physical intrusion upon persons, houses, papers, or effects, or involves an intrusion upon an actual and reasonable expectation of privacy.¹³

As applied to dog sniffs, the interesting question should always arise only in connection with the *Katz* prong of the test. If the police enter a home or a motor vehicle with a drug dog that, once inside, alerts to illegal drugs, there is no question that a search has taken place by virtue of the physical intrusion of the police and dog into the home or vehicle. However, when the drug dog sniffs without physically intruding upon persons, houses, papers, or effects, the

6. 1 DRESSLER & MICHAELS, *supra* note 5, § 10.01[c], at 163.

7. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

8. *Skinner v. Ry. Labor Excs. Ass'n*, 489 U.S. 602, 619 (1989) (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)); *T.L.O.*, 469 U.S. at 340.

9. *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

10. *Id.* at 466.

11. *Katz v. United States*, 389 U.S. 347 (1967).

12. *Id.* at 361.

13. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013); *United States v. Jones*, 132 S. Ct. 945, 949–50 (2012).

result is not so obvious. If this is a search, it can only be so because the criminal defendant has a reasonable expectation of privacy.

With this backdrop, how has the Court handled the question of whether sniffs by drug dogs constitute searches under the Fourth Amendment? In *United States v. Place*, the Court was presented with the "issue whether the Fourth Amendment prohibits law enforcement authorities from temporarily detaining personal luggage for exposure to a trained narcotics detection dog on the basis of reasonable suspicion that the luggage contains narcotics."¹⁴ The Court ultimately determined that property, like persons, can be constitutionally detained briefly on the basis of reasonable suspicion.¹⁵ However, because the detention of the luggage was too lengthy and otherwise too burdensome to fall within this rule, and because the police lacked the probable cause required for the full-blown seizure that actually occurred, any evidence discovered as a result of the detention of the luggage was the product of an illegal seizure.¹⁶

While the question of the admissibility of the evidence found within the luggage was, thus, fully resolved without the necessity of addressing any other legal issue, the Court did seize the opportunity to address the question of whether the dog sniff constitutes a search. To that end, Justice Sandra Day O'Connor, writing for a six-member majority, concluded that it did not, offering the follow analysis:

A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is

14. *United States v. Place*, 462 U.S. 696, 697-98 (1983). The significance of the term "reasonable suspicion" is that, while probable cause is required for a full-blown search or seizure, only reasonable suspicion—a lesser quantum of evidence—is required for a brief investigatory detention of a person (*Terry v. Ohio*, 392 U.S. 1 (1968)), or of property (*Place*, 462 U.S. at 697-98).

15. *Place*, 462 U.S. at 706.

16. *Id.* at 709.

limited. This limited disclosure also ensures that the owner of the property is not subjected to . . . embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a “search” within the meaning of the Fourth Amendment.¹⁷

In her smorgasbord of rationales for the Court's conclusion that a dog sniff is not a search, Justice O'Connor provided a less-than-excellent explanation of why the process falls outside the governing tests. Certainly the fact that “[a] ‘canine sniff’ by a well-trained narcotics detection dog . . . does not require opening the luggage” takes the process outside the trespass prong.¹⁸ As will be demonstrated, the fact that “the sniff discloses only the presence or absence of narcotics, a contraband item” is critical to the issue of whether the defendant possesses a reasonable expectation of privacy, but Justice O'Connor made no attempt to explain why this is so.¹⁹ Citation to factual irrelevances, such as the dog sniff being “much less intrusive than a typical search,” it “ensur[ing] that the owner of the property is not subjected to the embarrassment and inconvenience,” and it being “*sui generis*” simply muddled the inquiry, as none of these appear to have any relationship to either the *Katz* test or the Fourth Amendment.²⁰

In two separate opinions concurring in the judgment, three Justices chastised the Court for addressing an issue not briefed by the parties, not presented to the lower courts, and not necessary for the

17. *Id.* at 707.

18. *See id.*

19. *See id.*

20. *See id.*

judgment.²¹ Justices William Brennan and Thurgood Marshall specifically likened dog sniffs to recognized “searches” accomplished by “certain electronic detection devices” because each “adds a new and previously unobtainable dimension to human perception,” thus “represent[ing] a greater intrusion into an individual’s privacy.”²²

The next year, in *United States v. Jacobsen*,²³ having determined that federal agents had lawfully seized bags of white powder discovered by employees of a private carrier, the Court turned to the question of whether a chemical field test performed upon the white powder to determine that it was cocaine was in fact a search.²⁴ Citing *Place* as dictating the conclusion that such a procedure is not a search, the Court, per Justice John Paul Stevens, explained its conclusion:

The field test at issue could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine. It could tell him nothing more, not even whether the substance was sugar or talcum powder.

....

A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.... [E]ven if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special interest. Congress has decided—and there is no question about its power to do so—to treat the interest in “privately” possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably “private” fact, compromises no legitimate privacy interest.²⁵

Justice Brennan, joined by Justice Marshall, took issue with the Court’s resolution of this question, insisting instead that the Court has

21. *Id.* at 711 (Brennan, J., concurring).

22. *Id.* at 719–20.

23. *United States v. Jacobsen*, 466 U.S. 109 (1984).

24. *Id.* at 122.

25. *Id.* at 122–23.

“always looked to the context in which an item is concealed, not to the identity of the concealed item.”²⁶

What is most startling about the Court’s interpretation of the term “search,” both in this case and in *Place*, is its exclusive focus on the nature of the information or item sought and revealed through the use of a surveillance technique, rather than on the context in which the information or item is concealed. Combining this approach with the blanket assumption, implicit in *Place* and explicit in this case, that individuals in our society have no reasonable expectation of privacy in the fact that they have contraband in their possession, the Court adopts a general rule that a surveillance technique does not constitute a search if it reveals only whether or not an individual possesses contraband.

....

[I]f a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine, there would be no Fourth Amendment bar, under the Court’s approach, to the police setting up such a device on a street corner and scanning all passersby. In fact, the Court’s analysis is so unbounded that if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present. . . . Fortunately, . . . this Court ultimately stands ready to prevent this Orwellian world from coming to pass.²⁷

From a certain perspective, Justice Brennan was prescient in his anticipation. After he departed from the Court, the Court in 2001 was faced with “the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the

26. *Id.* at 139 (Brennan, J., dissenting).

27. *Id.* at 137–38.

meaning of the Fourth Amendment.”²⁸ The five-Justice majority in *Kyllo v. United States* concluded that where “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search.’”²⁹

The *Kyllo* opinion contains some broad language. In rejecting the Government’s contention that thermal imaging is not a search because it does not detect intimate or private information, the Court noted that the “Fourth Amendment’s protection of the home has never been tied to measurement of the quality or quantity of information obtained,”³⁰ that “[i]n the home, . . . all details are intimate details, because the entire area is held safe from prying government eyes,”³¹ and that “obtaining by sense-enhancing technology any information regarding the interior of the home . . . constitutes a search.”³²

Among other objections, the four dissenting Justices quarreled with the perceived overbreadth of the majority’s language:

It is clear, however, that the category of “sense-enhancing technology” covered by the new rule is far too broad. It would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *United States v. Place*, . . . we held that a dog sniff that “discloses only the presence or absence of narcotics” does “not constitute a ‘search’ within the meaning of the Fourth Amendment,” and it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either. . . .

The application of the Court’s new rule to “any information regarding the interior of the home” is also unnecessarily broad. If it takes sensitive equipment to detect an odor that identifies criminal conduct and nothing else, the fact that the odor emanates from the

28. *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

29. *Id.* at 40.

30. *Id.* at 37.

31. *Id.*

32. *Id.* at 34.

interior of a home should not provide it with constitutional protection.³³

Was the distress exhibited by the dissenters warranted? Did the majority in *Kyllo* truly intend to threaten the principal discussed in *Place* that processes that detect only criminal conduct cannot constitute a search? That is a most unlikely possibility. The Court's majority opinion in *Kyllo* references neither *Place* nor *Jacobsen*—an unimaginable oversight if the *Kyllo* Court intended to disturb the principle announced in *Place* and applied in *Jacobsen*. Moreover, the *Kyllo* majority made very clear that it did not view the thermal imaging device as fitting the paradigm of a process that “identifies criminal conduct and nothing else.”³⁴ In *Kyllo*, the Court specifically pointed out that the thermal imager “might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath” or “that someone left a closet light on.”³⁵

Notwithstanding whatever doubts *Kyllo* raised concerning the *Place/Jacobsen* rule, that principle was reenergized in *Illinois v. Caballes*.³⁶ There, the Court considered “[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.”³⁷ The Court accepted as uncontested that the traffic stop was justified at its inception and that the duration of the stop was not at all extended by the dog sniffing the defendant's car while the defendant was otherwise detained for the traffic violation.³⁸

As to the dog sniff that occurred during that lawful traffic stop, the Court concluded that no “search,” as that term of art is used under the Fourth Amendment, occurred.³⁹ No search takes place absent an interference with a legitimate expectation of privacy.⁴⁰ And, any expectation of privacy in contraband is not legitimate.⁴¹

33. *Id.* at 47–48 (Stevens, J., dissenting).

34. *Id.* at 48.

35. *Id.* at 38 (majority opinion).

36. *Illinois v. Caballes*, 543 U.S. 405 (2005).

37. *Id.* at 407.

38. *Id.* at 420–21.

39. *Id.* at 410.

40. *Id.* at 408.

41. *Id.* As the Court stated, “[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband . . .” *Id.* at 410. “[A]ny interest in possessing contraband cannot be deemed ‘legitimate.’” *Id.* at 408.

Society simply does not regard as legitimate a hope or expectation that criminal conduct will go undetected.⁴² Consequently, a “dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”⁴³

Justices David Souter and Ruth Bader Ginsburg authored separate dissenting opinions. Justice Souter argued that the conclusion that dog sniffs are not searches because they can only detect illegal drugs is premised upon “the assumption that trained sniffing dogs do not err.”⁴⁴ Citing evidence that drug dogs sometimes return false positives, Justice Souter concluded that:

Once the dog’s fallibility is recognized, . . . that ends the justification claimed in *Place* for treating the sniff as *sui generis* under the Fourth Amendment: the sniff alert does not necessarily signal hidden contraband, and opening the container or enclosed space whose emanations the dog has sensed will not necessarily reveal contraband or any other evidence of crime.⁴⁵

For Justice Souter, then, the dog sniff is no less a search than the thermal-imaging device addressed in *Kyllo*.

Unpersuaded, the Court’s majority announced that its “conclusion is entirely consistent” with the decision in *Kyllo*.⁴⁶ “Critical to [the *Kyllo*] decision was the fact that the device was capable of detecting lawful activity”⁴⁷ By contrast, even an “erroneous alert” by a drug dog does not reveal “any legitimate private information.”⁴⁸

Scholarly reaction to *Caballes* has been generally critical, and sometimes vitriolic. It has been deemed “a deeply problematic and dangerous intrusion into American civil liberties”⁴⁹ and a threat to a

42. *Id.* at 408–09.

43. *Id.* at 410.

44. *Id.* at 410 (Souter, J., dissenting).

45. *Id.* at 412–13.

46. *Id.* at 409 (majority opinion).

47. *Id.* at 409–10.

48. *Id.* at 409.

49. Cecil C. Hunt, II, *Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy*, 56 CASE W. RES. L. REV. 285, 286 (2005).

“free society.”⁵⁰ The *Place/Jacobsen/Caballes* conclusion that there is no legitimate interest in privacy for contraband has been mischaracterized as an exception to the Fourth Amendment.⁵¹ It has been attacked as doing violence to the Fourth Amendment by focusing upon the item sought rather than upon the place searched;⁵² the alleged consequence is that a search is ultimately justified, not prospectively, but retrospectively by the eventual recovery of contraband.⁵³

Forced to retreat by *Caballes*, its critics have entrenched at the doors to their homes. Because of the exalted status of the home in the hierarchy of private places, several commentators have suggested that, even if dog sniffs of luggage in public areas (*Place*) and dog sniffs of motor vehicles (*Caballes*) are not searches, dog sniffs to discover the contents of homes are surely Fourth Amendment searches.⁵⁴ One commentator has analogized dog sniffs of homes to Nazi Germany.⁵⁵

Assuming that the dog's location at the point of the sniff is not itself an invasion into a Fourth Amendment sanctuary, several courts confronted with the issue have concluded that the fact that the sniff detects drugs inside a home does not render the process a search under the Fourth Amendment.⁵⁶ In other words, the rationale that there is no legitimate expectation of privacy for contraband allows no exception for contraband in the home.⁵⁷ Other courts, however, have reasoned that the sacrosanctity of the home mandates the conclusion that a dog sniff disclosing the presence of contraband in a home is, in

50. Renee Swanson, *Are We Safe at Home from the Prying Dog Sniff?*, 11 LOY. J. PUB. INT. L. 131, 156 (2009).

51. Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MEM. L. REV. 299, 302 (2010).

52. Swanson, *supra* note 50, at 150–51; Hunt, *supra* note 49, at 296–99.

53. Michael Mayer, *Keep Your Nose Out of My Business – A look at Dog Sniffs in Public Places Versus the Home*, 66 U. MIAMI L. REV. 1031, 1038–39 (2012); Hunt, *supra* note 49, at 331–32.

54. Mayer, *supra* note 53, at 1037, 1039–40, 1054–56; Jared Willis, *Place Doesn't Apply to My Place; The California Home Is Sui Generis Because Medical Marijuana Is Not Contraband and Indiscriminate Residential Dog Sniffs Invade a Patient's Legitimate Expectation of Privacy*, 39 W. ST. U. L. REV. 187, 200 (2012); Mark E. Smith, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 HOUS. L. REV. 103, 137 (2009).

55. Willis, *supra* note 54, at 200.

56. E.g., *United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010); *United States v. Brock*, 417 F.3d 692, 695–97 (7th Cir. 2005); *People v. Jones*, 755 N.W.2d 224, 229 (Mich. 2008).

57. *Scott*, 610 F.3d at 1016; *Jones*, 755 N.W.2d at 229.

fact, a search.⁵⁸ There appeared to be every indication that the Supreme Court would settle the matter when it granted certiorari in the case of *Florida v. Jardines*.⁵⁹ However, the Court's decision in that case still leaves the matter unresolved.

In *Jardines*, police officers, accompanied by a drug dog, entered upon the front porch of the defendant's home for the purpose of allowing the dog to sniff for the presence of drugs within the home.⁶⁰ For about a minute or two,⁶¹ the dog tracked back and forth, "energetically exploring the area for the strongest point source of [the] odor [of drugs]."⁶² The dog indicated that the strongest odor of drugs was coming from the base of the front door.⁶³ The police subsequently obtained a search warrant for the defendant's home based upon the reaction of the drug dog, and the evidence found upon the execution of that warrant was the subject of the suppression motion that eventually brought the case before the Supreme Court.⁶⁴

A five-Justice majority began its analysis by reiterating that a Fourth Amendment intrusion can occur either by a physical trespass into an area specified in the Fourth Amendment or by an invasion into a legitimate expectation of privacy.⁶⁵ Because the area immediately surrounding the home that was entered by the police is considered part of the home for Fourth Amendment purposes,⁶⁶ a Fourth Amendment search occurred when the police penetrated the curtilage of the home.⁶⁷ Of course, a police officer may "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave" because this is the implied license that every citizen possesses.⁶⁸ However, because "[t]he scope of a license . . . is limited not only to a particular area but also to a specific purpose," "[t]here is no customary invitation" to

58. *E.g.*, *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985); *State v. Rabb*, 920 So. 2d 1175, 1189–90 (Fla. 2006); *State v. Davis*, 732 N.W.2d 173, 181 (Minn. 2007); *State v. Ortiz*, 600 N.W.2d 805, 819–20 (Neb. 1999).

59. *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

60. *Id.* at 1412.

61. *Id.* at 1421 (Alito, J., dissenting).

62. *Id.* at 1412 (majority opinion).

63. *Id.*

64. *Id.*

65. *Id.* at 1417.

66. *Id.* at 1414 (citing *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

67. *Id.* at 1417–18.

68. *Id.* at 1415.

“introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence.”⁶⁹

The State, predictably relying upon *Place*, *Jacobsen* and *Caballes*, argued that the dog sniff did not constitute a search because there is no legitimate expectation of privacy for illegal drugs.⁷⁰ However, because the “physical[] intru[sion] on Jardines’ property to gather evidence [was] enough to establish that a search occurred,” the Court did not need to decide whether the dog sniff “of Jardines’ home violated his expectation of privacy under *Katz*.”⁷¹

While the Court did not decide this issue, seven of the nine members of the Court were not the least reticent to address the question. In a concurring opinion, authored by Justice Elena Kagan and joined by Justices Ginsburg and Sonia Sotomayor (each of whom was among the five Justices constituting the Court’s majority on the issue upon which the *Jardines* case was actually decided), the three indicated that they would have “happily”⁷² and “easily”⁷³ also decided the case by holding that the dog sniff was a search.⁷⁴ In the opinion of these three Court members, that question has “already [been] resolved” by *Kyllo*.⁷⁵ Tracking the language of *Kyllo*, the concurring Justices would treat the drug dog as a “‘device . . . not in general public use’ . . . to ‘explore details of the home’ . . . that [the police] would not otherwise have discovered without entering the premises.”⁷⁶

Four dissenting Justices (Samuel Alito, John Roberts, Anthony Kennedy, and Stephen Breyer) quarreled primarily with the majority’s holding that the physical intrusion onto the defendant’s property was outside of the scope of the customary implied license to approach the front door of the home of another.⁷⁷ They also disputed the concurring Justices’ opinion on the dog sniff question. In their view, that the drugs sensed by the dog are located in a home rather than in a motor vehicle does not alter the conclusion that there is no

69. *Id.* at 1416.

70. *Id.* at 1417.

71. *Id.* at 1417–18.

72. *Id.* at 1418 (Kagan, J., concurring).

73. *Id.*

74. *Id.* at 1418–19.

75. *Id.* at 1419.

76. *Id.*

77. *Id.* at 1424 (Alito, J., dissenting).

reasonable expectation of privacy for exclusively illegal items.⁷⁸ They pointed out that, as the Court previously stated in *Caballes*,⁷⁹ *Kyllo*'s thermal imaging device is an inappropriate analogue to a drug dog.⁸⁰ Unfortunately, rather than developing this distinction by focusing upon the fact that a thermal imaging device, unlike a drug dog, can expose information about legal behavior, Justice Alito's opinion addresses the unhelpful questions of whether a dog's sense of smell is legally distinguishable from a human's sense of smell,⁸¹ whether a drug dog is "technology,"⁸² and whether "use of dogs' acute sense of smell in law enforcement" is "new" or "dates back many centuries."⁸³

II. Discussion

There can be no dispute that, in the furtherance of Fourth Amendment values, physical evidence of criminal conduct is often shielded from detection. However, it does not follow from this that the privacy of such evidence is itself an axiomatic principle of Fourth Amendment jurisprudence. As will be demonstrated, the protection of criminal evidence is actually a collateral consequence, and not an objective, of the Fourth Amendment.

At the heart of the debate about dog sniffs, and similar actual or foreseeable techniques, is the fundamental question of whether the concealment of evidence of criminal conduct is a goal of the Fourth Amendment. Certainly, proponents of the *Place/Jacobsen/Caballes* line of reasoning have concluded that dog sniffs and the like fall outside the scope of Fourth Amendment intrusions precisely because they threaten only the detection of criminal evidence, and the Fourth Amendment is simply not designed to protect the privacy of such evidence per se.⁸⁴

Less obvious, perhaps, but equally certain, is that the opponents of the *Place/Jacobsen/Caballes* analysis have started with the precept

78. *Id.* at 1425.

79. *Id.*

80. *Id.*

81. *Id.* at 1421.

82. *Id.*

83. *Id.*

84. *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005); *United States v. Jacobsen*, 466 U.S. 109, 122–23 (1984); *United States v. Place*, 462 U.S. 696, 707 (1983).

that the Fourth Amendment legitimizes the expectation of privacy in criminal evidence.⁸⁵ As one commentator has pronounced:

I may not have the right to commit a crime, but I do have the right to keep criminal evidence in my home a secret. The government may not invade my home in the search of contraband, because it would negate an important aspect of what it means for that home to be my private space.⁸⁶

That statement, at face value, is patently false. If the police were to arrive tomorrow at one's door carrying a search warrant for the home, it would become immediately apparent that the government may, indeed, "invade [the] home in the search of contraband." It might also become obvious, shortly thereafter, that one does not "have the right to keep criminal evidence in [the] home a secret."

Of course, all of us are well aware of this. So, hyperbole aside, the quoted passage must be at least downsized to the proposition that we "have the right to keep criminal evidence in [our] home[s] a secret" unless the police have probable cause that this is precisely what we are doing,⁸⁷ and "the government may not invade [our] home[s] in the search of contraband" unless the police have probable cause that this is precisely what will be found.

Having, in the interest of accuracy, qualified the claimed right to "keep criminal evidence in [our] home[s] a secret," the question that must be asked is whether it makes any sense to understand this as a "right" at all. How can one be said to enjoy a right to anything if, as soon as the state has good reason to believe that the citizen might be

85. When Justices Brennan and Marshall objected to the majority's "focus on the nature of the information or item sought . . . rather than on the context in which the information or item is concealed," they verbalized their position that even evidence of criminal conduct is protected in certain contexts. *Jacobsen*, 466 U.S. at 137 (Brennan, J., dissenting). Moreover, when Justices Kagan, Ginsburg, and Sotomayor concluded that a dog sniff of a home is a search because it reveals information not otherwise discoverable without entering the home, they necessarily concluded that no exception to this legitimate expectation of privacy exists for exclusively criminal evidence. *Florida v. Jardines*, 133 S. Ct. 1409, 1419 (2013) (Kagan, J., concurring).

86. Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What Katz Is Made Of?*, 41 U.C. DAVIS L. REV. 781, 826–27 (2008).

87. Often a search of a home also requires the acquisition of a search warrant as well. However, this increases neither the nature nor the quantum of evidence the police must have in order to search; it merely adjusts the arbiter of probable cause from a law enforcement officer to a judicial officer.

exercising that right, the state can immediately put a stop to it? Would anyone sensibly understand that a citizen enjoys a right to vote if, upon a showing of probable cause that the citizen is seeking to exercise that right, the state could lawfully prevent the citizen from voting? Similarly, how can one justifiably understand the Fourth Amendment as endorsing a right to privacy in concealing criminal evidence when it abandons that endorsement as soon as there is probable cause to believe that a person is exercising this supposed right?

The point can be further demonstrated by a comparison with the Fifth Amendment privilege against self-incrimination. In relevant part, the Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."⁸⁸ This is truly a right. It is a right to be free from compelled self-incrimination. To paraphrase the comment cited earlier,⁸⁹ I may not have the right to commit a crime, but I do have the right to keep criminal evidence in my thoughts a secret.

Nowhere in the text or the judicial construction of this right is there even a suggestion that compelled self-incrimination will be allowed if, for example, there exists probable cause that the individual possesses self-incriminating information. As such, the Fifth Amendment privilege manifests a value judgment that compelled self-incrimination is intolerable. The right is a right to be free from an objectionable process. Plainly, the right is not reserved for the innocent, and it is not designed only to permit us to keep to ourselves our *innocent* secrets.⁹⁰

The designers of the Fifth Amendment privilege against self-incrimination undoubtedly sought to outlaw compelled self-incrimination, as no allowance is made in the Fifth Amendment for a government interest sufficiently weighty to override the privilege. The Fourth Amendment, by contrast, presents no such categorical condemnation of the process it regulates. Compelled, testimonial self-incrimination may be absolutely proscribed, but searches do not suffer the same censure. Searches are routinely permitted, albeit with some prerequisites. This is no accident. The Framers could easily have created an absolute right of privacy, say, for example, in the

88. U.S. CONST. amend. V.

89. Gruber, *supra* note 86, at 826-27.

90. See *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). In fact, because a precondition for the privilege is that the compelled testimony be incriminating, the innocent are far less likely to have occasion to invoke the right than are the guilty.

home, by disallowing penetration of the home even with a warrant. This, however, they conspicuously chose not to do. There can be no doubt that the drafters of the Fourth Amendment intended to allow searches, even in the most private of locations.

Well, then, since it is manifest that the Framers did not intend to cloak physical evidence with the same immunity granted to a suspect's thoughts, the question remains: Which endeavors to discover physical evidence did the Framers think desirable and which did they find objectionable? It will not suffice to say that searches conducted with probable cause and a warrant are the goal of the Fourth Amendment. No one wishes to have his home searched pursuant to a warrant based upon probable cause. The requirement of probable cause is a means to an end, not an end in and of itself. The requirement of probable cause should function as a proxy for approximating, often on the basis of uncertain information, the distinction between undesirable and desirable intrusions.

So the question could be reformulated as follows: in a perfect world, which intrusions would we allow and which would we prohibit? More importantly, what answers to these questions are to be derived from the Fourth Amendment itself? Given the relatively qualified restrictions placed upon searches by the Fourth Amendment, it is neither persuasive nor satisfying to suggest, as some have done,⁹¹ that the Fourth Amendment was intended to protect the places searched and that therefore the legality of the items sought is irrelevant.

By way of illustration, imagine two individuals: A and B. Each of A and B have within their homes a shoebox containing very private letters. In the case of A, these letters are correspondence between A and his lover containing no evidence of criminal conduct, past, present or future. In the case of B, these letters are communications between B and his lover planning and recounting a bank robbery committed by the two correspondents. Imagine further that the police have solid information as to the actual content of the letters of each of A and B, as well as probable cause to believe, in each case, that the letters are located in a shoebox on the floor of the closet of the master bedroom of the home. If the police were to apply for search warrants to enter the homes of A and B to recover the respective sets of letters, a warrant would be issued for B's home, but not for the home of A.

91. *United States v. Jacobsen*, 466 U.S. 109, 137 (1984) (Brennan, J., dissenting); Swanson, *supra* note 50, at 150; Hunt, *supra* note 49, at 298.

This disparate result would occur notwithstanding the parallel search locations. The only distinguishing factor, and one that is dispositive on the issuance of the warrant, is that the items sought from B's home are evidence of criminal behavior while the items sought from A's home are not. At the very least, this illustrates that the criminal nature of the items sought is absolutely relevant to, and indeed sometimes dispositive of, the resolution of the Fourth Amendment issue. Indeed, in a perfect world, we would hope to allow all searches that produce criminal evidence and proscribe all searches that do not.⁹² However, in the imperfect, but real, world in which the Fourth Amendment must operate, we permit intrusions based upon the probability of discovering criminal evidence.

In other words, given the necessary uncertainties when operating prospectively, we allow a warrant to search B's home because of the reasonable chance of discovering criminal evidence. The hurdle of probable cause is not erected because we wish to legitimize B's privacy in his bank robbery correspondence; that requirement is imposed because the Fourth Amendment limits the allowable risks of discovering truly innocent, albeit private, items. That is why, as in the case of A, if the intrusion is to seize truly noncriminal evidence—items that are neither contraband nor of any evidentiary significance—no amount of probable cause will be sufficient to permit the intrusion.

Some might attempt to retreat without surrendering by arguing that a person does have a legitimate expectation of privacy in criminal evidence, albeit a much reduced right that is more easily outweighed by the state's interest in combating crime. However, if this were so, how could one ever hope to balance the respective interests of the citizen and the state in applying the Fourth Amendment to individual cases? How can one hope to assign relative weights to two competing interests if those interests are one and the same? More particularly, if the state has a legitimate interest in discovering criminal evidence, and the individual has a legitimate interest in concealing the same evidence, how can one hope to balance these interests? Unless one is willing to say that categorically, one of these interests always trumps the other—the consequence of which would be that the losing interest

92. Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1244 (1983).

has no legitimacy under the Fourth Amendment—how does one weigh the respective interests?⁹³

Consider further the impact of probable cause. The greater the probability that criminal evidence is located in the place to be searched, the greater the likelihood that the search will be permitted under the Fourth Amendment. However, if the individual truly has a legitimate expectation of privacy in concealing criminal evidence, why does the individual's interest in privacy move inversely to the probability that the object of that privacy interest exists? In concrete terms, if I truly have a "right to keep criminal evidence in my home a secret,"⁹⁴ why does that right disappear in direct proportion to the increased probability that I actually have the criminal evidence in my home? The only sensible explanation is that I do not have any such "right to keep criminal evidence in my home a secret,"⁹⁵ and the probability that the evidence exists in the targeted location only affects the state's interest in discovering such evidence.

All of this leads to one conclusion: The Fourth Amendment does not, at its core, recognize as legitimate or reasonable any right to conceal evidence of a crime.⁹⁶ This does not mean that only the innocent are entitled to Fourth Amendment protection. Nor does this mean that all successful efforts to discover criminal evidence are not "searches" and therefore need not comply with Fourth Amendment restrictions. This is so for two reasons.⁹⁷

First, it is often the case that criminal evidence cannot be discovered or seized without also intruding upon legitimate expectations of privacy.⁹⁸ By way of illustration, recall the example of B, the individual who keeps criminally conspiratorial letters in a shoebox in his home. While there is nothing to support the notion that B's privacy in such conspiratorial letters is of any value

93. If, as I suggest, the individual's only legitimate interest is in noncriminal evidence, then no such problem exists. The state's interest in discovering criminal evidence and the individual's interest in preserving privacy for noncriminal items are now distinct and can be assigned different weights depending on the circumstances of the individual case.

94. Gruber, *supra* note 86, at 826–27.

95. *See id.*

96. Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1349 (2002); Loewy, *supra* note 92, at 1230.

97. I suspect that the failure to recognize this has led to some overzealous insistence that the Fourth Amendment recognizes a reasonable expectation of privacy for criminal evidence.

98. Simmons, *supra* note 2, at 413.

whatsoever under the Fourth Amendment, it is impossible to discover and seize these letters without entering B's home and thereby intruding upon the myriad noncriminal items and information in B's home as to which B unquestionably enjoys a legitimate expectation of privacy. The only way to insure B's reasonable expectation of privacy for the noncriminal possessions in his home is to extend the Fourth Amendment restrictions to all searches of his home, regardless of the goal of the search. In that respect, B enjoys Fourth Amendment protection for his criminal letters as an incidental benefit to our constitutional commitment to protect his reasonable expectation of privacy for his noncriminal possessions.⁹⁹

Second, ordinarily, one cannot know that the target of the search is, in fact, criminal evidence unless and until the search is completed. By then, of course, the risk that the object of the search is entirely innocent will, in some cases, have been realized. Legitimate Fourth Amendment values will have been compromised. Operating prospectively, the Fourth Amendment attempts to minimize this risk by requiring a showing of probable cause—or some alternative. Probable cause is, in essence, an endeavor to predict the likelihood of “success”—measured by the recovery of criminal evidence and the reduction of circumstances in which noncriminal items are exposed. The requirement of probable cause certainly does not arise from an undertaking to protect the privacy of criminal ventures. If that were the goal, there would be no rational correlation between the presence of probable cause and the constitutional legitimacy of the search.

Although the Court has perhaps not been as meticulous as one might hope in explaining itself, I do believe this is what the Court has had in mind when it has characterized dog sniffs as “*sui generis*.”¹⁰⁰ The illegal drugs detected by the drug dogs are contraband and do not merit any consideration in and of themselves under the Fourth Amendment. Moreover, the process of dog sniffs involves none of the risks of ordinary searches and, therefore, under the Fourth Amendment, there is no reason to treat these as Fourth Amendment intrusions in order to protect legitimate privacy.

Assuming that the time¹⁰¹ and place¹⁰² of the dog sniff involves no Fourth Amendment transgressions, the sniff itself does not constitute

99. Loewy, *supra* note 92, at 1230.

100. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *United States v. Place*, 462 U.S. 696, 707 (1983).

101. In other words, the item to be sniffed has not been seized or detained for an impermissible amount of time. See *Place*, 462 U.S. at 709–10.

a “search” under the Fourth Amendment. The drug dog simply indicates “a yes or a no”¹⁰³ to the question of the presence of illegal drugs, and “neither answer implicates any legitimate expectation of privacy.”¹⁰⁴ Moreover, because the drug dog cannot convey any other information, drug sniffs create no risk of intruding upon legitimately private matters.

Finally, unlike true searches, the fact that dog sniffs will not disclose legitimate private matters is not something we know with certainty only after the search is consummated. A dog sniff is “defined not by what [it] actually detects, but rather what it is able to detect.”¹⁰⁵ To the extent that the Fourth Amendment requires probable cause in order to filter out searches that present too high a risk of revealing only innocent, private matters, why would we need to screen procedures such as dog sniffs, that, even measured prospectively, present no possibility whatsoever of revealing innocent, private matters?

On this last point, some have argued that it depends on the assumption that drug dogs are flawlessly accurate, an assumption that is arguably unjustified.¹⁰⁶ That objection, however, is entirely misdirected. The fallibility of dog sniffs is irrelevant to the issue of whether dog sniffs are Fourth Amendment searches.

Consider this hypothetical scenario. Suppose an individual shows up at a local police station and informs the police that he is a clairvoyant with the unique ability to detect, from a public street, the presence of stolen property located within a home without the necessity of visually observing the interior of the targeted property. Suppose further that the self-proclaimed psychic claims no ability whatsoever to identify any contents other than stolen property, and therefore, like the drug dog, cannot invade any legitimate expectation of privacy. The police employ the individual, and, after a time, he identifies several homes as containing items stolen during recent burglaries. At that point, no search has taken place for all of the reasons explained earlier.

102. In other words, the location of the dog to accomplish the sniff is not itself an impermissible Fourth Amendment search. *See Florida v. Jardines*, 133 S. Ct. 1409 (2013).

103. *Simmons*, *supra* note 96, at 1354.

104. *Id.*

105. *Simmons*, *supra* note 2, at 432.

106. This point was the focus of Justice Souter’s dissenting opinion in *Illinois v. Caballes*, 543 U.S. 405, 410–17 (2005) (Souter, J., dissenting), and has been echoed by some commentators, e.g., Hunt, *supra* note 49, at 316.

Now suppose—advancing Justice Souter’s objection to its strongest possible factual scenario—that the “clairvoyant” is a fraud, that he possesses none of his claimed abilities, and that none of the homes identified by him actually contain any stolen property whatsoever. Does this additional fact convert the procedure used by the individual into a search? It does not, and that is because, first, the nature of the information revealed remains the same whether the perception is accurate or not, and second, the clairvoyant, like the drug dog, reveals no information about legitimately private matters. Consequently, the proper characterization of the dog sniff as something other than a search under the Fourth Amendment is completely unaffected by the possibility of false positives from the drug dogs.

Of course, there could be an actual Fourth Amendment search subsequent to a positive result from a dog sniff. If a drug dog alerts to the presence of illegal drugs in a home from a position that is not itself a physical trespass onto a protected area,¹⁰⁷ one should expect the police to then seek to obtain a search warrant for the home. If the drug dog was inaccurate, then when the warrant is issued, the result will be a search that is at the heart of what the Fourth Amendment was designed, to the extent reasonably possible, to prevent. The residents will have had their legitimate privacy compromised and, with the benefits of hindsight, for no good reason.

Nevertheless, the Fourth Amendment “search” in this scenario takes place when the police enter the home with a search warrant, not earlier when the drug dog sniffs the home from the street. An event that is not a search is not magically transformed into a search merely because it eventually yields information that leads to a search. If that were the case, then every observation made by a police officer in a public area would have to be reclassified as a search whenever the observations did lead, or perhaps merely because they could lead, to the issuance of a search warrant.

If drug dogs are insufficiently reliable, then that information would be extremely relevant to whether dog sniff results constitute probable cause for the issuance of a search warrant. One commentator has suggested that more than probable cause should be required to conduct a search based upon the results of a dog sniff or

107. For example, suppose a drug dog, from a public street, is able to alert to drugs within a home, thereby avoiding an unlicensed entry into the curtilage of the home that was fatal to the state’s position in *Florida v. Jardines*, 133 S. Ct. 1409 (2013).

some similar process.¹⁰⁸ Whether that would be a good idea, and whether that could be accomplished short of a constitutional amendment, are interesting questions separate from, and beyond the scope of, the one issue addressed in this Article.

The simple truth is that dog sniffs, and any other real or hypothetical techniques that can disclose nothing more than the presence or absence of criminal activities, are not searches under the Fourth Amendment. It is clear from the operation of the Amendment that it was never designed with the ambition of insulating criminal activity from detection. In practice, the concealment of criminal behavior is often made possible by the Fourth Amendment, but only as a collateral cost of protecting our privacy for noncriminal matters. When a technique exists for exposing criminal evidence without any risk whatsoever of exposing legitimately private matters, the use of that technique is entirely consistent with Fourth Amendment values and concerns that constitutional freedoms are being eroded are “misplaced.”¹⁰⁹

It is perhaps unfortunate that this issue arises, at least thus far, solely in connection with the possession of illegal drugs. There is certainly a serious view that questions the wisdom, and sometimes even the propriety, of criminalizing the possession of such drugs. One possible consequence of this might be that our ambivalence about criminalizing drug possession fuels our resistance to the prospect of drug dogs sniffing for drugs and distorts our analysis of the purely legal question of whether techniques that can detect only the presence or absence of criminal activities, and nothing more, intrude upon Fourth Amendment values.

In an effort to isolate this question, consider one last hypothetical scenario. Suppose that dogs could be trained, or technology created, to detect solely the presence or absence of sexual molestation of children, and nothing else. I suppose it is a matter of opinion whether, in the cause of civil liberties, one would want to place restrictions upon the use of such animals or machines to protect the privacy of the child molesters. What should not be a matter of opinion is that the Framers of the Fourth Amendment did no such thing.

108. Simmons, *supra* note 2, at 458–59.

109. Simmons, *supra* note 96, at 1357.
